IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19__

NO. 79-386

JACK H. HARRISON, as Temporary Trustee of the Linn-Henley Charitable Trust,
Petitioner

vs.

BIRMINGHAM TRUST NATIONAL BANK, a national banking institution, as Co-trustee of the Linn-Henley Charitable Trust, SOUTHERN BANCORPORATION OF ALABAMA, a Delaware Corporation, JOHN C. HENLEY, III, as Co-trustee of the Linn-Henley Charitable Trust, and CHARLES A. GRADDICK, Attorney General of the State of Alabama
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner respectfully prays that a Writ of Certiorari issue to review that part of the final order of the Supreme Court of the State of Alabama entered on April 6, 1979, in which Petition for Rehearing was denied on June 8, 1979, which reversed the judgment of the trial court awarding to the Linn-Henley Charitable Trust the sum of One Million Two Hundred Thousand Dollars ($1,200,000), as set out in Part II of the order, in the following entitled case:

Birmingham Trust National Bank, et al.

77-382 v.

John C. Henley, III, et al.

AND

Charles A. Graddick, Attorney General

77-382A v.

Birmingham Trust National Bank, et al.

AND

John C. Henley, III, et al.

77-382B v.

Birmingham Trust National Bank, et al.

Appeal from Jefferson Circuit Court

OPINIONS BELOW

There were two appeals in this case. The opinion of the Supreme Court of Alabama on the first appeal is reported in *Henley v. Birmingham Trust National Bank*, 295 Ala. 38, 322 So.2d 688. That part of the judgment here sought to be reviewed is contained in the opinion of the Supreme Court of Alabama reported in 371 So.2d 883 (Advance Sheet) and is set forth as Appendix "A(1)". The order denying the application for rehearing is set forth as Appendix "A(2)". The Appendix is separately presented to this petition.

JURISDICTION

The opinion of the Supreme Court of Alabama was entered on April 6, 1979. Application for rehearing was denied on June 8, 1979. The jurisdiction of this court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Whether a merger and plan of reorganization adopted by a national bank constituted a triangular merger impermissible under Title 12, §215a(a), and "inconsistent with sections 215-215b of this Title," where the bank ("Old" Bank), desiring to restructure its corporate structure so as to become a subsidiary of a "Holding Company", formed a Delaware business corporation ("Holding Company"), and a phantom national bank ("New" Bank); and where upon the effective date of the merger the "Old" Bank became merged into the phantom "New" Bank, all of the stock of the phantom "New" Bank, except qualifying shares, was transferred to the "Holding Company", and all of the shareholders of the "Old" Bank were required to exchange their stock in the "Old" Bank on a share-for-share basis for the stock of the "Holding Company".

2. Whether a national bank violates the provisions of Title 12, § 215a(d) where it merges with a phantom national bank and adopts a merger and plan of reorganization which provides, with respect to the rights of dissenting stockholders, that the shares of stock of a "Holding Company", a non-banking business corporation, shall be sold by the receiving association at an advertised public auction, instead of the shares of stock of the receiving association which would have been delivered to dissenting stockholders had they not requested payment, as required by § 215a(d).

3. Whether the purported merger and plan of reorganization described in 1 above constitutes a mere package or two-step transaction containing (1) a merger of two national banks, as permitted by § 215a, and (2) an exchange of the "Holding Company" stock for the stock of the merging "Old" Bank, with the result that neither the merging "Old" Bank nor the "New" Bank, nor the "Holding Company" could compel the stockholders of the "Old" Bank to convert their shares into the

shares of the "Holding Company", a mere business corporation, foreign to the merger of the two national banks.

4. Whether the proxy statement, circulated through the mails by the "Old" Bank to its stockholders, including the Linn-Henley Charitable Trust, which owned 27,460 shares of its stock, and which dissented from the merger, was false and misleading and violated the provisions of Title 15 USCA § 77q, 15 USCA § 78n, the provisions of Rule 14a-9 of the Securities & Exchange Commission, Item 9 of the Comptroller of the Currency, Schedule B, required to be filed pursuant to Rule 12 CFR 11.3, and the fiduciary regulations of the Comptroller then in effect.

5. Whether the distribution of the "Holding Company" stock to the stockholders of the merging bank required registration under the Securities Act of 1933, since the exchange of the "Holding Company" stock for the stock of the merging "Old" Bank was not pursuant to either the Alabama statutory provisions or the provisions of the Federal Banking Act relating to mergers of national banks, and constituted a mere tender offer by the "Holding Company" of its stock to the stockholders of the "Old" Bank in exchange for their stock in the "Old" Bank.

6. Whether the "New" Bank, in offering the unregistered stock of the "Holding Company" at public auction, pursuant to the provisions of the merger and plan of reorganization, and in selling the same to its parent, the respondent, Southern Bancorporation of Alabama, in competition with the Linn-Henley Charitable Trust of which it was co-trustee, was so blinded by conflict of interest and was guilty of such infidelity to the trust, as a dissenting stockholder, as disclosed by the record, that it violated the provisions of Title 15 USCA, §§ 77e and 77q of the Securities Act of 1933, § 10b of the Securities and Exchange Act of 1934, Rule 10b-5 of the Securities and Exchange Com-

mission, as well as the fiduciary regulations of the Comptroller of the Currency, 12 CFR 9.

(a) Whether the violation by the bank, as co-trustee, of the provisions of § 10 and Rule 10b-5 may be used by the Linn-Henley Charitable Trust as a defense to and in a counter-claim against a petition initiated by the Bank, as co-trustee, in a state equity court for instructions and for an order ratifying and confirming the sale of such unregistered stock of the "Holding Company" to its parent at the public auction in question.

(b) Whether the violation by Respondents of any provision of the Securities and Exchange Act of 1934 rendered void the contract of purchase and sale of the "Holding Company" stock at the public auction in question, as regards the Respondents who made or engaged in the performance of such contract, within the meaning of Title 15 USCA § 78cc, thus rendering it improper for a court to confirm the same.

7. Whether the remedy of an appraisal provided for a dissenting minority stockholder is exclusive, so that a court in equity is restricted thereby in affording relief by the application of equitable principles, where there has been fraud or oppressive or unfair treatment of the minority stockholder in the appraisal process.

8. Whether the decision of the Supreme Court of Alabama reversing the judgment of the trial court in equity, based upon substantial evidence adduced at a trial lasting some six weeks, and which declined to confirm the sale of the "Holding Company" stock by the respondent bank to its parent, and which required both respondents to disgorge to the Trust the profits accruing to them resulting from such purchase, is so contrary to the ancient, well-established and universally-applied rules of trust law, as well as the traditional rules of appellate review, that it does not rest upon substantial and adequate state ground.

9. Whether Alabama courts in the exercise of their general equity powers are required to redress breaches of trust that are evidenced by violations of federal law, which under the Supremacy Clause (Article VI of the Constitution of the United States) is part of the total corpus juris of Alabama; and whether the same considerations that impel the Supreme Court of the United States, as a matter of federal law, to find a violation of the supreme law of the land should be recognized by Alabama courts in exercising their general equity powers.

10. Whether the validity of a statute of the United States is drawn in question here, or whether petitioner has specially set up or claimed a title, right, privilege or immunity under the Constitution or statutes of the United States, and whether such right, privilege or immunity was denied by the judgment of the Supreme Court of Alabama in reversing the judgment of the trial court in question.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The pertinent portions of the Supremacy Clause of the United States Constitution, Article VI, provides:

> "This Constitution, and the laws of the United States which have been made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The pertinent provisions of Title 12, USCA §§ 215a, 215b and the Regulation of the Comptroller of the Currency, 12 CFR § 11.6, Schedule B, Item 9, dealing with solicitation of proxies are set forth in Appendix B(1). The pertinent provisions of Title 12, USCA, § 92a relating to trust powers of national banks, are set forth in Appendix B(2). The pertinent provisions of the Regulations of the Comptroller of the Cur-

rency relating to fiduciary powers and obligations of national banks, 12 CFR 9, are set forth in Appendix B(3). The pertinent provisions of the Federal Securities laws, Title 15 USCA §§ 77e, 77*l*, 77n, 77*o*, 77p, 77q, 77v, 78j, 78n; and Rule 10b-5, 17 CFR § 240.10b-5, and Rule 14a-9, promulgated by the Securities and Exchange Commission, are set forth in Appendix C(1).

The opinion of Professor Louis Loss, (Loss, Securities, Regulation) analyzing the opinion of the Supreme Court of Alabama in *Henley v. Birmingham Trust National Bank,* 322 So.2d 687 and the Amended and Supplemental Counter Complaint filed by Petitioner, is set forth in Appendix B(4).

All appendices are separately presented to this petition.

STATEMENT OF THE CASE

The Respondent Birmingham Trust National Bank ("Old" Bank or "BTNB") became a national banking association on, to-wit, December 20, 1946. Since 1946 and for a period of some 22 years the "Old" Bank engaged in the general banking business in Birmingham, Alabama, becoming the second largest bank in the state. As of June 30, 1968, the "Old" Bank, operating with some 17 different branches, had capital stock of $10,000,000, divided into 1,000,000 shares held by some 1,500 stockholders of the par value of $10 each, a surplus of $10,000,000 and an undivided profit of $2,417,053.40.

Some time in the fall of 1968 the "Old" Bank desiring to restructure its corporate structure so as to become a subsidiary of a holding company, formed a Delaware business corporation known as BTNB Corporation ("Holding Company"), with a relatively nominal capital stock, all of which was owned by the officers and directors of the "Old" Bank. On October 15, 1968 the "Old" Bank also formed a phantom national bank known as the Alabama National Bank ("New" Bank), also with

a relatively nominal amount of capital stock, all of which, except qualifying shares owned by the officers and directors of the "Old" Bank, was owned by the "Holding Company."

The "Old" Bank, the "New" Bank, and the "Holding Company" then entered into a so-called Merger and Plan of Reorganization, which provided, among others, that immediately prior to the effective date of the Merger, to-wit, December 31, 1968, the authorized capital stock of the "Holding Company" would be increased from 100 shares to 1,000,100 shares, and the shares of the "New" Bank would be increased from 20,000 shares to 1,020,000 shares.

On the effective date of the Merger the "Old" Bank merged into the "New" Bank, all of the stock of the "New" Bank, except qualifying shares, was transferred to the "Holding Company," and all the shareholders of the "Old" Bank were required to exchange their stock in the "Old" Bank on a share-for-share basis for the stock of the "Holding Company."

Following the Merger, all of the stock of the "New" Bank, being owned by the "Holding Company," was no longer traded on the market, or marketable. (R. p. 1904)

Under the provisions of Title 12 USCA § 215a(d), it is provided that the shares of stock of the receiving association, which would have been delivered to a dissenting stockholder had he not requested payment, are required to be sold by the receiving association at an advertised public auction. In this case the Merger Agreement provided that the stock of the "Holding Company" would be sold at public auction. This stock was unregistered under the Securities Act of 1933. It was required to be so registered before it could be sold or distributed to the public. (Professor Loss, Add. Vol. 2-B, p. 609, 613, Record 1230, BTNB Ex. 108, R. p. 2620). See also Appendix B(4) to this petition.

BTNB Engages In Long Bitter Dispute With Individual Co-Trustee As To His Right To Dissent

BTNB and John C. Henley, III, are Co-trustees of the Linn-Henley Charitable Trust (the "Trust") which held 27,460 share of the "Old" Bank stock. Henley, as Co-trustee, dissented from the Merger, and on January 30, 1969 Henley made a written request upon BTNB that the Trust be paid the value of its stock (CC-X 58; R. p. 1860).

Thereafter, BTNB for a period of almost nine months engaged in a bitter and acrimonious controversy with Henley with respect to his right to dissent from the proposed Merger and Plan of Reorganization, and the appraisal of the "Old" Bank stock held by the Trust, taking the following positions and performing the following acts: (CC-X 58; R. p. 1860).

(i) BTNB did not notify Henley, as Co-trustee and as dissenting stockholder, in writing of the date of the consummation of the Merger, as required by the Proxy Statement.

(ii) That Henley did not have the right to unilaterally dissent from the Merger without the concurrence of BTNB, although BTNB had for years prior to the merger advised Henley that the Bank cannot vote its stock held in a fiduciary account, but that he as an individual Co-trustee may do so. (R. pp. 2465, 1491)

(iii) That Henley did not have the right to "surrender" the stock certificates in order to be entitled to receive the value thereof.

(iv) That it is questionable whether Henley is the sole Trustee for the purpose of deciding whether the "value" which might be agreed upon by two of the three appraisers to be appointed pursuant to §215a(c) is "satisfactory." (CC-X-64)

(v) It is not clear that Henley alone can "appeal" from the value fixed by two of the three appraisers to the Comptroller.

(vi) That although Henley voted against the merger in the proxy for the special meeting of shareholders, BTNB took the position that the proxy which was signed by Mr. Henley contained language constituting a contractual agreement on his part to accept the stock of the "Holding Company".

(vii) Questioned Henley's right to unilaterally *deliver* the stock certificates to BTNB and "receive the value of the shares" without any action by the joint trustee. (Brief memorandum of Facts and Issues, dated May, 1969 (R. 2784).

(viii) Attempted by questionable means to induce the individual Co-trustee to endorse a divivend check issued by BTNB Corporation to the Trust on the spurious assumption that the Trust had exchanged the shares of stock in the "Old" Bank for the stock of the "Holding Company".

(ix) Exerted economic pressure upon and warned Henley of personal responsibility in an effort to get him to withdraw his dissent. (R. p. 2448 to 2458).

Finally, on September 9, 1969 the Board of Directors of BTNB met, at which time the Board recognized that it "inevitably occupies inconsistent positions in respect to the effectiveness of the dissent" and "that the bank cannot put itself in a position of hampering efforts of Mr. Henley to procure the highest valuation for the Trust if it is to continue as Co-trustee." (R. p. 4094).

Thereafter, on September 23, 1969, BTNB addressed a letter to the Comptroller of the Currency requesting that he make an appraisal of the "Old" Bank stock held by the Trust. (R. p. 4143)

BTNB Knew That The Plan Of Reorganization Did Not Comply With Federal Banking Act And That The Auctions To Be Held Thereunder Were Improper

As early as January 31, 1969, counsel for BTNB prepared a memorandum (CCX-64, R. 1871) in which he indicates that the national banking laws did not anticipate a "Phantom Bank" merger, saying:

> "As you know, the National Banking Laws did not anticipate a 'phantom bank' merger. In the event the value fixed is not satisfactory, or is not fixed within 90 days, under Section 215a(d), the shares of stock of the Continuing Bank which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the Continuing Bank at an advertised public auction and the Continuing Bank shall have the right to purchase such shares at such public auction, if the highest bidder thereof, for the purpose of reselling such shares within thirty days, etc.
>
> "Section (8) of the Merger and Reorganization Agreement provides that the common stock of the Holding Company (not the capital stock of the Continuing Bank) which would have been delivered to John Henley, as trustee, shall be sold. Section (8) of the Merger and Reorganization Agreement was approved by the Comptroller of the Currency.[1]

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[1]This is contrary to the caveat in the Form 1931 (a) (Revised March 1968) of the Office of the Comptroller of the Currency, giving instructions for the preparation of applications for merger under Section 215a of Title 12, USCA, wherein it is specifically stated: (R. p. 2299)

"The fact that a proxy statement, form of proxy, or other soliciting material has been filed with or examined by the Comptroller of the Currency shall not be deemed a finding by the Comptroller that such material is accurate or complete or not false or misleading, or that the Comptroller has passed upon the merits of or approved any satement contained therein, or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made."

"It appears that the stock to be valued may be the stock of the Continuing Bank but the stock that is to be sold under the Merger Agreement is the stock of the Holding Company."

On December 3, 1969, counsel for BTNB held a telephone conversation with the Assistant Chief, National Bank Examiner of the Comptroller of the Currency, in which counsel stated that the "Holding Company" stock is not registered and it would cost approximately $40,000 to register that stock in order that it may be sold by the issuer without restrictions. *The stock, however, could be sold subject to certain restrictions but this would affect the value received or the marketability of that stock.*" (CCX 52, Add. Vol. 1, p. 109) (Italics ours)

Counsel for BTNB concluded, however: "Since BTNB Corporation will probably buy the stock in that auction, I would simply proceed to advertise the shares for sale as restricted shares, and no problem will arise." (BTNB Ex. 108. R. 2620)

The Public Auctions Of The "New Bank" And The "Holding Company" Stocks And The Self-Dealing On The Part Of BTNB

The Auction Of The Unregistered Stock Of The Holding Company

Thereafter, the "New Bank" found itself on two horns of a dilemma as follows:

(a) First, what stock would be sold at the public auction. The Banking Act requires that the stock of the "Receiving Association" be sold at public auction; whereas, the Merger and Plan of Reorganization provides that the stock of the "Holding Company" be sold at public auction;

(b) How does the "New Bank", a non-issuer but an underwriter, participating in a public distribution of the

"Holding Company" stock, proceed to hold a public auction of unregistered stock of the "Holding Company"?

The "New Bank" took the bull by both horns and plunged into a legal morass from which it could not extricate itself. It proceeded to hold a public auction on February 10, 1970 of the unregistered stock of the "Holding Company", without actively soliciting bidders, pursuant to a newspaper advertisement which recited the fact that the stock was unregistered under the Securities Act of 1933 and that it would be sold only pursuant to an investment letter. (CCX 147, Add. Vol. III, p. 660, R. p. 2483)

At this time, some 14 months following the effective date of the Merger, bank stocks generally became depressed, and the market price of the stock of the "Holding Company" had dropped from some $31 a share immediately after the Merger to some $23 a share on February 10, 1970.

Henley, realizing that a sale of the "Holding Company" stock at public auction as unregistered stock in a depressed market to be held at this late date could not possibly bring an amount in excess of $32.80 per share, seeing the complete collapse of the second phase of the appraisal process, and noting that the "New Bank", which then constituted the sole asset of the "Holding Company", was doing exceedingly well, and that the corporate trustee had already previously recommended this exact stock as an excellent investment for the Trust, now recommended to the corporate co-trustee that it was advisable that the "Trust" purchase this stock as an investment at the then prevailing depressed market price. The "New Bank", and the "Holding Company" on the other hand, now determined that it was to their best interests "so that in time we will recover our dollars in value" (R. 4816-20) that the "Holding Company" become the purchaser of this stock and that they themselves would bid up to $32.80 per share. (R. pp. 5030-32, 4812-4819)

Accordingly, they ignored Henley's effort to bid and the "Holding Company" was the sole bidder and became the purchaser of this block of stock at the bid price of $26 per share. (R. p. 5212-5227, CCX 36, 37, 137, 138; Add. Vol. III, p. 634-645, R. pp. 2460-2461, 1808-1810)

At no time after this auction did the bank or its parent offer the Trust the opportunity to acquire the Holding Company stock which the Trust sought to purchase. (R. 4823)

The Auction Of The "New" Bank Stock

Thereafter, counsel for Henley called the Bank's attention to the fact that the National Banking Act requires that the stock of the "Receiving Association" is to be held at public auction. The "New Bank", desiring to humor Henley and his counsel, held a sham public auction of 27,460 shares of the "New Bank's" stock on March 6, 1970, and "sold" the same to the "Holding Company" at $24 per share, well knowing that all of the stock of the "New Bank" had already been transferred to the "Holding Company" upon the effective date of the Merger and Plan of Reorganization and that it did not own any such stock.

Furthermore, even if the "New Bank" had somehow acquired 27,460 shares of its stock, which it is prohibited from doing by Title 12 § 83, the sale thereof would have been contrary to the Plan of Reorganization.

Finally, no meaningful sale of the "New Bank" stock could have been held because the same was no longer tradeable on the market (R. pp. 4818-21, 4858-9) and there was no likelihood that anyone would purchase a minority interest of such non-tradeable stock where the remaining approximately 1,000,000 shares were held and owned by the "Holding Company". (R. p. 604950)

The evidence shows that no money changed hands and no record of this sale was made on the books of either company. (R. p. 3748-3752). The whole transaction was a mere charade.

The Subsequent Involvement Of BTNB In The Appraisal Process Before The Comptroller Of The Currency

Subsequently, BTNB, without knowledge of, or notice to, Henley (R. p. 5210), wrote two letters to the Comptroller of the Currency, dated October 28 and 29, 1969 in which it sought to influence the Comptroller's evaluation of the 27,460 shares of the bank stock owned by the trust to the prejudice of the trust, saying, among others:

> "In the past we have handled several estates and trusts which own stock of Birmingham Trust National Bank. We received blockage discounts in all cases where a few thousand shares or more of bank stock were involved." (CC-H 54; Add. Vol. 1, p. 166; R. p. 4198).

Even before that date the chairman and executive officer of BTNB and its counsel visited the office of the Comptroller of the Currency, without disclosing such visit to Henley (R. p. 1804), in which they sought the sympathetic understanding of the Comptroller relating to Henley's dissent and the problems relating to the dissent procedure and the evaluation of the bank's stock.[1]

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[1]This information is being furnished merely to show the background of the case. The fraudulent conduct and infidelity on the part of BTNB with respect to the evaluation of the bank stock by the Comptroller of the Currency was made the basis of a separate claim by Petitioner. A judgment for damages in this regard was rendered by the trial court and affirmed by the Supreme Court of Alabama in its order here involved. (Appendix A-16). We are advised that the bank is in the process of instituting an application to this court for certiorari to the Supreme Court of Alabama in order to review this phase of the case, although the judgment thereon was based not upon a review of the legality or illegality of the findings by the Comptroller, but solely upon state law for fraud and breach of fiduciary duty on the part of BTNB, as co-trustee, in connection therewith, and does not involve a federal question. SEC v. National Securities, 393 U.S. 453, 21 L.Ed.2d 688, 89 S.Ct. 564.

The Proceedings In The Court Of First Instance

Sometime in October 1971, some 18 months following the public auction in question and the purchase of the "Holding Company" stock by the Respondent, BTNB Corporation, whose name has subsequently been changed to Southern Bancorporation of Alabama, BTNB filed a petition in the Circuit Court, Tenth Judicial Circuit of Alabama, in Equity, Case No. 168-659, in which John C. Henley, III, the individual co-trustee, and William J. Baxley, the then Attorney General of the State of Alabama, were Respondents. The petition was styled:

"Petition for Instructions, For Confirmation of Certain Transactions, and for Partial Settlement by One of the Co-trustees of the Linn-Henley Charitable Trust."

The petition, which is a part of the record in this case, describes the merger and plan of reorganization, attaching thereto, among others, the proxy statement pertaining to the special meeting of shareholders called for the purpose of approving the merger, the merger and reorganization agreement, and the plan of reorganization. Paragraph 17 of the petition states as follows:

"17. Provisions of law (12 U.S.C. 215a(d) pursuant to which the said merger was accomplished require that the shares of stock of the receiving association which would have been delivered to any dissenting shareholders, had they not requested payment, be sold by the receiving association at an advertised public auction and that, if such sale brings a price greater than the amount paid to the dissenting shareholders, the excess of such sale price be paid to the dissenting shareholders. Intending to comply with applicable provisions of law concerning such sales, petitioner caused an advertisement ("Advertisement No. 1") to be published in the February 2, 1970, edition of *The Birmingham Post-Herald* as follows:

Pursuant to Section (8) of the Merger and Reorganization Agreement by and between Birmingham Trust National Bank, Alabama National Bank and BTNB Corporation, dated October 15, 1968, 27,460 shares of the common stock of *BTNB Corporation* shall be sold at public auction on February 10, 1970 at 11:30 o'clock, A.M. (CST) at the Board of Directors Room, Second Floor, of the main office of Birmingham Trust National Bank, 112 North 20th Street, Birmingham, Alabama.

These shares have not been registered under the Securities Act of 1933, and are offered for sale for investment only. Any purchaser of these shares will be required to pay cash and make appropriate investment representations in writing to the issuer." (Italics ours)

In ¶ 22 of the petition BTNB alleged:

"Petitioner asserts that it has done all things that were required of it as co-trustee of the trust *in connection with the said dissent from its said merger, including the said appraisal,* the payment to the trust of the appraised value of the stock, *and the said public auction sales as and when all such things should have been done* . . . Petitioner has proposed to John C. Henley, III and does now suggest to the court that the following steps by petitioner will fully satisfy all fiduciary obligations which petitioner may have with respect to the transactions hereinabove described . . ."

Under ¶ 26 of the petition it is stated:

"Petitioner submits itself to the jurisdiction of this court and offers to do equity."

Under ¶ D of the Prayer for Relief, it is prayed:

"That this court enter an order decreeing that the auction sales of the shares of stock of BTNB Corporation and of the shares of stock of petitioner, described in ¶ 17 of this

petition, fully comply with the requirements of 12 USC 215a(d) and confirming the said sales in all respects."

Under ¶ G of the Prayer it is prayed:

"That upon petitioners making payment to the trustees of such additional interest, if any, as the court shall find will fully satisfy petitioners' fiduciary obligations as a co-trustee with respect to the transaction described above, *relating to the said merger, the said dissent, the said payment of the value of the stock in the said auction sales,* this court will enter an order decreeing (1) *that petitioner is fully and finally released and discharged of and from all its fiduciary obligations as a co-trustee of the trust with respect to petitioners' merger that was effective December 1, 1968, the dissent from the said merger by John C. Henley, III, with respect to the stock of petitioners' predecessor, Birmingham Trust National Bank, held by petitioner and John C. Henley, III, as trustees of the Linn-Henley Charitable Trust, in payment of the appraised value of the said stock to the trust,* and, further decreeing (2) that petitioner and respondent, John C. Henley, III, in their individual and corporate capacities and in their fiduciary capacities as co-trustees of the Linn-Henley Charitable Trust be finally released and discharged with respect to all the acts and dealings affecting the funds and property of the trust from the beginning of the trust to the date of the filing of this petition." (Italics ours)

Henley counterclaimed against BTNB alleging, among others, breach of fiduciary duty on the part of BTNB *arising out of the public auction of the unregistered stock of BTNB Corporation and the sale thereof to BTNB Corporation, in competition with the expressed desire on the part of Henley as individual co-trustee to purchase said stock for the trust.* The trial court rendered a decree holding that there was no breach of

fiduciary duty to the trust on the part of BTNB, although criticizing BTNB for failing to file a petition for instructions in order to resolve the various conflicts and disputes.

The cause was appealed by Henley to the Supreme Court of Alabama. The appellate court in *Henley v. Birmingham Trust National Bank*, 295 Ala. 38, 322 So.2d 688, reversed the trial court, and found BTNB guilty of a breach of its fiduciary duty owed to the trust based upon the fundamental rule of law that a trustee must act in good faith and display complete loyalty to the interest of his beneficiary, and that it was the duty of BTNB to recognize its obvious conflict of interest and to resolve it by at least temporarily resigning as trustee. *The court concluded that it was not reviewing the finding of the Comptroller of the Currency or the right of BTNB to merge under the Federal Banking Act, but that it was simply reviewing the acts of the co-trustees, as such acts relate to their fiduciary duties to the trust.*

The court remanded the case to the trial court with directions to appoint a temporary trustee of the trust estate in lieu of the named co-trustees for the sole and limited purpose of the retrial of this cause, and upon resubmission of the cause to make certain specific findings and conclusions.

The Course Of The Proceedings On The Retrial After Remand And The Manner In Which The Federal Questions Sought To Be Reviewed Were Raised

Following remand of this cause, the court below, in accordance with directions of the Supreme Court of Alabama, appointed the Petitioner as Temporary Trustee and the undersigned as his counsel. Pursuant thereto, the Temporary Trustee filed an Amended and Supplemental Counter Complaint against BTNB and its parent, BTNB Corporation. The stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the Federal

questions sought to be reviewed were raised are contained in portions of the record so voluminous that they are included in Appendix D(1) and D(2), respectively, separately presented.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets, and fails to apply to the facts in the case, the governing principles of the Federal Banking Act and the applicable regulations of the Comptroller of the Currency promulgated thereunder, as well as the decisive principles of the securities laws of the United States, and the rules and regulations of the Securities and Exchange Commission promulgated thereunder. These federal laws are, of course, binding upon the Supreme Court of Alabama under Article XI of the United States Constitution, and it is these laws which the Supreme Court of Alabama ignored in deciding this case.

The Respondent Bank has flaunted these laws and in doing so has committed the most flagrant breaches of fiduciary duty to a charitable trust of which it was co-trustee, relying primarily on alleged informal approvals given by the then Comptroller of the Currency in an ex parte, behind-the-scenes buddy-buddy relationship. Accordingly, this petition raises issues of far-reaching importance affecting the relationships between national banks and the Comptroller of the Currency by whom they are regulated, as well as the alarmingly growing abuses by national banks in the areas of self dealing and conflict of interest which have led to the enactment by Congress of the Financial Institutions Regulatory Act of 1978.

In the report of the Housing, Banking, Finance and Urban Affairs Committee of the Congress (Report 95-1383), following an extensive investigation, the committee deplored the lack of impartiality on the part of banking agency officials who were wedded to the industry being regulated, and said:

> "Problem banks and insider abuses have been virtually synonymous. Nothing appears more often on the fever charts of sick financial institutions than self dealing ailments."

We do have here self dealing of the most foul nature. But this is only one strand in the fabric constituting a "single seamless web", along with manipulation and disregard of trust relationship by those "whom the law should regard as fiduciaries". The respondent bank, as fiduciary, did engage in self dealing and by illegitimate and fraudulent means has caused great harm to the beneficiaries of the Linn-Henley Charitable Trust, in violation of the Federal Securities Laws, within the meaning of the rationale of *Superintendent of Insurance v. Bankers Life & Casualty Company*, 404 U.S. 6, 30 L.Ed.2d 128, 92 S.Ct. 165.

As was said by the Michigan Supreme Court in *Peoples Savings Bank v. Stoddard v. Michigan National Bank*, 359 Mich. 297, 102 N.W.2d 777, 83 A.L.R.2d 344,

> "We deal here with a story of high finance and less lofty subterfuge. By this latter means the defendant, Michigan National Bank sought to accomplish indirectly that which state and federal law prohibited it to do directly."

And so it is here.

Accordingly, since it appears that this is a case of first impression in this court, it is of nation-wide importance that this court construe the National Banking Act in conjunction with the federal securities laws and the corresponding regulations of the Comptroller and the Securities and Exchange Commission, in order to determine the scope and limits of the merger provisions applicable to national banks, as well as the extent of the fiduciary obligations of national banks under these federal laws.

I.

There is no triangular merger here involved; the distribution of the "Holding Company" stock required registration under the Securities Act of 1933

12 U.S.C. § 215a(a) contemplates mergers only of "one or more national banking associations or one or more state banks . . . under an agreement not inconsistent with sections 215-215b of this title, . . . into a national banking association located within the same state . . ." There is no reference in the Banking Act to any sort of triangular merger whereby the requisite vote of shareholders to take stock of a nonbanking Delaware corporation, such as the BTNB Corporation.

> Opinion of Professor Louis Loss, Appendix B(3);
>
> *Marcou v. Federal Trust Company,* 268 A.2d 629, 635 (Me. 1970);
>
> *Dyer v. Eastern Trust & Banking Company,* 336 F.Supp. 890 (D. Me. 1971)

Under these authorities the only way for an existing bank to become the subsidiary of the bank holding company would be to cause the formation of a holding company, which would then tender its shares in exchange for the shares of the bank. Such a procedure would require registration of the stock of the bank holding company under the 1933 Act.

In a similar attempt to structure a triangular merger in *Marcou,* the Maine court stated:

> "The plan is a package containing a merger and an exchange for bank shares. It does not meet the conditions of the merger statute. Federal may not under the statute compel its stockholders to convert their shares into shares of a company not a trust company resulting from the pro-

> posed merger. This, however, is precisely what is proposed in the plan. In short, Marcou, who objects to the plan, will be forced out of the resulting or surviving Federal. He is offered not shares in the merged bank, or Federal, but shares in Bankshares."

A similar bank reorganization under Maine law was sought in *Dyer*, wherein the bank relied on Rule 133 of the Securities & Exchange Commission. The court rejected the application of this rule, stating:

> "The exemption for statutory mergers provided by Rule 133 . . . can reach only so far as to exempt the initial merger transaction. It does not reach beyond the merger to exempt the later distribution of unregistered stock, since it is clear that the exchange of stock was not pursuant to the Maine statutory provisions relating to mergers."

It follows, therefore, that the offer of the "Holding" Company stock to the shareholders of BTNB violated § 5 of the 1933 Act.

II.

The offer and sale of the "Holding Company" stock at a public auction violated § 5 of the Securities Act of 1933

There is no way that unregistered stock can be sold at a public auction pursuant to an investment letter. As Professor Loss states, ". . . An offering at a public auction is by hypothesis an offer to the highest bidder, which is to say, an offer to the world." A public auction is a public offering and a public offering cannot become nonpublic merely because as a condition of the offering all buyers agree to take for investment.

III.

The manipulations by BTNB constituted a violation of § 10 of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder

Disregard of trust relationship by national banks as fiduciaries "are all a single seamless web" along with manipulation, investors' ignorance, and the like; and practices legitimate for some purposes may be turned to illigitimate and fraudulent means, within the ambit of § 10(b), although this section does not seek to regulate transactions which constitute no more than internal corporate mismanagement. *Superintendent of Insurance v. Bankers Life & Casualty Company,* 404 U.S. 6, 30 L.Ed. 2d 128, 92 S.Ct. 165; *Bailey v. Meister Brau, Inc.,* 378 F.Supp. 869 (1973), aff'd., *Bailey v. Meister Brau, Inc.,* 535 F.2d 982 (7th Cir. 1976).

The history of the act shows that Congress was especially concerned with the impact of frauds on creditors or corporations, which, of course, would include, the most favored in equity, charitable trusts.

The holding of a public auction of unregistered stock of the holding company, pursuant to the provisions of the Federal Banking Act, was so manifestly unfair to the trust that the bank, blinded by conflicts of interest, wantonly ignored evidence of the unfairness of the transaction, and wantonly failed to disclose to the individual co-trustee material facts. Furthermore, it knowingly conducted a sale of unregistered stock of the holding company with full awareness that to do so would have an adverse effect upon the bidding, would discourage the presence of bidders, and would depress the value of the stock.

All of this, coupled with the behind-the-scenes activity on the part of the bank in its relationship with the Comptroller of the Currency, the circulation of a misleading proxy statement, the improper structure of the Plan of Reorganization, and self deal-

ing, constitute not only the most flagrant breach of fiduciary duty but the kind of fraudulent manipulation condemned by both the 1933 and 1934 Securities Acts.

Bailey and *Superintendent of Insurance* have dispelled any implication that might have been drawn from earlier cases that 10b-5 cannot reach a breach of fiduciary duty by controlling stockholders or directors and that the only remedy lies under state law. As *Bailey* points out, there is nothing to the contrary in *Ernse & Ernst v. Hochfelder,* 96 S.Ct. 1375, 47 L.Ed.2d 668.

IV.

Although a state court does not have jurisdiction to entertain a claim under § 10 of the Securities and Exchange Act of 1934, it does have jurisdiction to entertain such a claim asserted as a defense to a suit instituted in a state court

Claim violations of the Securities & Exchange Act of 1934 asserted as defense to a counterclaim in a state court, could be litigated in the state court action, despite exclusive jurisdiction of federal courts over violations of the Act. *Will v. Calvert Fire Insurance Company,* 437 U.S. 655, 57 L.Ed.2d 504, 98 S.Ct. 2552; *Weiner v. Shearson, Hammill & Company,* 521 F.2d 817, 822 (C.A. 9th Cir. 1975); *Atner State Bank v. Altheimer,* 430 F.2d 750, 754 (C.A. 7th Cir. 1970).

In this connection, it must constantly be borne in mind that it is the respondent bank which initiated a proceeding in an Alabama court of equity, seeking an order, among others, decreeing that the auction sale of the shares of stock of BTNB Corporation fully complied with the requirements of 12 U.S.C. 215a(d), and that such sale should be confirmed in all respects.

The Counter-Complaint on the part of the Temporary Trustee was filed in defense to such declaratory action and in opposition thereto.

Accordingly, the state court could take cognizance of the violation of fiduciary duties on the part of the bank arising from the breach of the federal securities laws. As a result thereof the trial court was impowered, indeed obligated, to decline to ratify such sale and to grant appropriate equitable refied resulting from the fraudulent self dealing and manipulation condemned by the Securities Exchange Act of 1933, § 17(a), 15 U.S.C.A. § 77q(a), as well as the Securities Exchange Act of 1934, § 10b, 15 U.S.C.A. § 78j(b), Rule 10b-5 promulgated thereunder by the Securities & Exchange Commission, and the fiduciary Rules and Regulations of the Comptroller of the Currency.

The relief granted by the trial court in requiring the Respondents to disgorge the profits made by them to the Trust is entirely consistent with *J. I. Case v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555, and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616, and *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 31 L.Ed.2d 741, 92 S.Ct. 1456.

In reversing the trial court, the Alabama court misconstrued and misapplied the federal law, or refused to apply the same, as construed by this court, when it was obsessed with the proposition that it did not appear that the "Holding Company" stock would have produced a bid in excess of $32.80 per share at the public auction.

Aside from the proposition that the court overlooked the fact that it was the bank which was responsible for delaying the auction, while it carried on a vendetta with the individual cotrustee, so that the same was held some 14 months following the merger when the value of the stock depreciated some 25%, and aside from the fact that the Plan of Reorganization made the stock of the "New" bank unavailable for sale, the Alabama court failed to take into consideration the holding of this court in UTE that the measure of damages for a defrauded

seller under the Federal Securities laws where the defendant receives more than the seller's actual loss is "the amount of the defendant's profit."

In *Junigan v. Taylor,* 344 F.2d 781, cert. den. 392 U.S. 879, 15 L.Ed.2d 120 the court held: "It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."

That the Trust is a "seller", within the meaning of the Securities laws is no longer open to question. *SEC v. National Securities, Inc.,* 21 L.Ed.2d 668; *Swanson v. American Consumer Industries, Inc.,* 415 F.2d 1326 (C.A. 7th Cir.).

We submit that the Trust is also a "buyer", within the meaning of the Securities Act of 1933, to the extent of the interest it acquired under the Federal Banking Act in the stock of the receiving association, and under the Plan of Reorganization in the stock of the "Holding Company", to the value of such stock in excess of the appraised value of the "Old" Bank stock. That interest is a valuable property right which the Trust "purchased" when it dissented from the merger.

V.

The contract of sale to, and the purchase by, the Holding Company of the unregistered stock of the "Holding Company" at the public auction is void and unenforceable either under the 1933 or the 1934 Security Acts

Where the wrongdoer sues on a contract consummated in violation of any provision of the securities laws, enforcement may be denied. Thus, an agreement would not be enforced in favor of the corporation, which failed to register the securities. *General Life of Missouri Investment Company v. Shamburger,* C.A. Ark. 1976, 546 F.2d 774; *Byrnes v. Faulkner, Donkins and Sullivan,* C.A. N. Y. 1977, 550 F.2d 1303.

It follows, therefore, that when the respondent bank instituted an action in a court of equity seeking to uphold the validity of the contract of sale of the unregistered stock of the "Holding Company" to its parent at the public auction in question, it came into court as a wrongdoer, and it would have been improper for the Chancery Court, in the exercise of its equitable jurisdiction, to approve and confirm such a sale.

For the same reasons it was improper for the Supreme Court of Alabama to reverse the trial court, and to thus validate a contract of sale which was void, as regards the rights of the Respondents who violated any provision, rule or regulation under the Securities Act of 1933, and especially those under the Securities Act of 1934, Title 15 § 78cc.

VI.

There is no substantial independent state ground to support the judgement below

The Supreme Court of Alabama misconstrued both the holding of the trial court and the contentions of the Petitioner by deciding the case on the narrow issue that:

> "The theory advanced by the Temporary Trustee and the basis of this award in the court's decree, was that BTNB breached its duty to the trust in refusing to purchase the stock for the trust."

The Basis Of The Award By The Trial Court

This, of course, is totally untrue and contrary to the record. If the bank had sold the "Holding Company" stock to a stranger, we would not be here before this court. It is the sale by the bank at the public auction of unregistered stock, in violation of the Securities Act of 1933, and it is the sale of such

stock by a co-trustee at his own auction to its affiliate, the respondent, Southern Bancorporation of Alabama, in competition with the trust, which is the gravamen of the complaint and which is the basis upon which the award was made by the trial court.

It is true, of course, that Henley desired to purchase this stock for the trust because it was then for the best interest of the trust to do so, and it is also true that the bank had refused to acquiesce in the effort by Henley to acquire this stock for the trust at the public auction. But this is not the heart of the case, it is simply another circumstance, which, together with the totality of all of the breaches of fiduciary duty and the violations of federal law, which brings into focus the federal questions here involved.

That the decision of the trial court was not based upon the mere failure on the part of the bank to acquiesce in the sale of the stock to the Trust is conclusively shown by the following extracts from this opinion:

> "2(d) & (c). The Court finds that, under the Plan of Reorganization here in question, and under the newly-developed evidence and the law applicable thereto, it clearly appears that BTNB did not provide for the holding of a public auction of the 'New' Bank stock, as provided by the Federal Act; that all such stock, except qualifying shares, were, upon the effective date of the Merger, transferred to and were owned by the 'Holding Company'; and that thereafter the 'New' Bank stock was neither marketable nor tradeable on any market. Additionally, on March 6, 1970, on which date BTNB attempted to have a public auction of this stock, more than 14 months elapsed since the effective date of the Merger. This unduly long delay was occasioned by the breach of fiduciary duty on the part of BTNB in improperly engaging in a struggle with the

individual Co-Trustee, Henley, as to his right to dissent in behalf of the Trust from the Merger. In the meantime, however, the local market on bank stocks became greatly depressed.

"Accordingly, the Court further finds that BTNB made it impossible to hold a legal, realistic or meaningful public auction of the 'New' Bank stock, as required by the Federal Act, and that the public auction of this stock purportedly held by BTNB on March 6, 1970, aside from the fact that BTNB failed to actively solicit bidders at this auction, was totally ineffectual."

. . .

"The Court further finds that, in the light of the newly-developed evidence adduced on the re-trial of this cause, and the legal theories advanced by the Temporary Trustee, that it was legally prohibitive and otherwise completely impracticable for BTNB to hold a realistic and meaningful public auction, in accordance with the requirements of the Federal Banking Act, of *unregistered stock* of the 'Holding Company' on February 10, 1970, after a similar undue delay following the effective date of the Merger." (Appendix A-10)

. . .

"At the auction, BTNB ignored Henley's advice and request and collaborated with the 'Holding Company' in permitting it to be the sole bidder and purchaser of this stock.

"The Court further finds that such self-dealing on the part of BTNB, in collaboration with its affiliate, constitutes a separate, distinct and independent breach of trust on the part of BTNB which arises out of the same opera-

tive facts and the conflict of interests referred to by the Supreme Court in 2(b) and (c) above." (Appendix A-11)[3]

"By thus competing with the Trust and engaging in self dealing, in and about the administration of this Trust, BTNB was guilty of an even more flagrant breach of fiduciary duty than the failure to actively seek potential bidders as of the time of the public auctions referred to by the Supreme Court in 2(b) and (c) above.

"The Court further finds that the 'Holding Company' in purchasing the 27,460 shares of its stock at the public auction in question willfully and knowingly participated in the violation of the fiduciary duty on the part of BTNB, with full knowledge of such breach on the part of BTNB, and that both BTNB and the 'Holding Company' are liable to the Trust for the profits accruing to them upon the purchase of this stock to the extent of the difference between the bid price of $26 per share made by the 'Holding Company' and the highest intermediate value of said stock up to the date of trial of $70 per share, and that both BTNB and the 'Holding Company' are liable to the Trust for such profits amounting to the total sum of $1,208,240.00." (Appendix A-12)

The Basis Of The Contentions By The Petitioner

The contentions of the Petitioner are set forth in Appendix D. Additionally, every count of the counter-complaint bristles with federal questions and claims. For instance Count II of the counter-claim reads:

[3]Under the mandate of the Supreme Court upon remand after the first appeal, the Supreme Court directed the trial court to . . . determine the true bid value of the 'New' Bank stock had BTNB, absent its conflict of interest, actively sought potential bidders as of the time of the public auction as provided by the Federal Act."

COUNT II

THE SECURITIES CLAIMS

Counter-claimant, for allegations of this Count, adopts all the allegations hereinabove set out, including the allegations of Count One of the Complaint, and adds thereto the following:

Counter-claimant further avers that because of the matters and things hereinabove alleged, the counter-defendants have violated the provisions of Title 53, §§ 28, 30, 44 and 45, Code of Ala. 1940, as recompiled, as well as the provisions of Title 15, §77*l*, 77*o*, 77q and 77v, USCA; that the "Trust" constitutes a forced seller, within the meaning of the state and federal securities laws; that the acts complained of constitute an engagement on the part of the counter-defendants in an act, practice or course of business which operated or would operate as a fraud or deceit upon the "Trust", in violation of Title 53, § 28, Code of Ala. 1940, as supplemented, and Title 15, § 77q(a) of the Securities Act of 1933, and the fiduciary duties on the part of the counter-defendants to the "Trust".

WHEREFORE, counter-claimants seek damages from the counter-defendants for the difference in the amount paid to the "Trust", as determined by the Comptroller of the Currency, and the actual value of said stock on the date of the filing of this counter-complaint, or, the sum of $472,312, together with a reasonable attorney's fee.

Count VI of the Counter-Complaint reads in part:

COUNT VI

CLAIM FOR DAMAGES FOR THE ABUSE BY COUNTER-DEFENDANTS OF THE APPRAISAL PROCESS UNDER THE BANKING LAWS

Counter-complainant, for this count, restates all of the facts hereinabove set out, and further alleges as follows:

1. Counter-complainant claims damages from the counter-defendants for the breach of the fiduciary duties to the "Trust" in the appraisal process following the merger of the two banks on the ground of self dealing on their part, and on the further ground that they so structured the purported Merger and Plan of Reorganization as to make it impossible for the "Trust" to receive the full benefits to which it was entitled under the merger provisions of the federal banking laws, as hereinabove more fully set out.

2. Counter-complainant further alleges that the counter-defendants have subverted the appraisal process provided under the federal banking laws and have converted the benefits provided thereunder to their own use, as hereinabove more fully alleged, and that it is impossible and impractical at this time to unscramble the transactions so as to make them comply with the requirements of the federal banking laws or to determine the damages to which the "Trust" is entitled as of the date and times the counter-defendants failed to comply with the federal banking laws and with the appraisal process provided thereunder.

Supreme Court Of Alabama Concedes Existence Of Federal Questions To Be Resolved

The Supreme Court of Alabama admits the existence of federal questions, saying:

> "The Temporary Trustee argues that the bank can be charged with breach of its duty by virtue of the Plan of Reorganization it elected to pursue. It is quite true that § 215, supra, does not contemplate the exact type of reorganization which management and the majority stockholders of BTNB adopted. That plan has heretofore been set out. It was, therefore, not entirely clear what stock should be offered at the auction. Whether the stock of

the "New" national bank or the stock of the "Holding Company".

This is enough to trigger the federal question involved here. It also conclusively shows that the proxy statement was misleading, as a matter of law, since surely stockholders were entitled to know that they had the right to *acquire* "New" Bank stock and what their rights were upon dissent. *Mills v. Electric Auto-Lite Company,* 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616; *SEC v. National Securities,* 393 U.S. 453, 212 L.Ed. 2d 668; *May v. Midwest Refining Company,* 25 F.Supp. 560, aff'd. 121 F.2d 431, cert. denied, 86 L.Ed. 534; *SEC v. Dolnick,* 501 F.2d 1279 (7th Cir. 1974); *Dyer v. Eastern Trust & Banking Company,* 336 F.Supp. 890 (1971).

VII.

The judgment of the Supreme Court of Alabama is not supportable by any independent state ground

The basis of the reversal by the Supreme Court is:

> "Tested by these standards, did BTNB breach its duty to the Trust in refusing to acquiesce at Henley's suggestion to acquire as an investment for the Trust the stock offered at auction?
>
> "We hold that it did not and reverse that part of the decree of the trial court so holding."

As we have previously indicated, there is no decree so holding. This is an incidental issue which was simply a part of the overall picture, and which was not the sole basis of the Petitioner's claim nor the sole basis upon which the court rendered judgment against the Respondents. It simply rendered more flagrant the evil of self dealing as part of the manipulative and fraudulent practices engaged in by respondents, in violation of the Federal Securities laws. The Alabama Supreme Court can-

not choose one ingredient comprising the totality of the fraud, one strand of the web, set it up as a decoy, shoot it down, and then triumphantly reverse the judgment of the trial court.

Even if the trial court had assigned the wrong reason for its judgment the same must be affirmed, if it correctly determined the equity of the case based upon federal law. The questions to be determined by an appellate court is whether a judgment is correct, considering the evidence in the case, and not whether the ground on which it professes to proceed is tenable. *Pan American Fire & Casualty Company v. DeKalb-Cherokee County Gas District,* 266 So.2d 763, 289 Ala. 206; *Staub v. Alabama Power Company,* 350 So.2d 386; *Bryant v. Moss,* 329 So.2d 538, 295 Ala. 339.

The same principle applies in the federal courts. *Lum Wan v. Esperdy,* 321 F.2d 123 (C.A. N. Y. 1963); *California Bankers Association v. Shulz,* 94 S.Ct. 1494, 416 U.S. 21, 39 L.Ed.2d 812.

The decision by the Supreme Court of Alabama reversing the judgment rendered by the court below, if based upon a non-federal ground of decision, is without fair support, and it is the province of this court to inquire not only whether the federal right was denied in direct terms but whether it was denied in substance and effect. *Ancient Egyptian Arabic Order of Nobles of the Mistic Shrime of Michaux,* 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931; *Creswill v. Grand Lodge Knights of Pythias,* 32 S.Ct. 822, 225 U.S. 246, 56 L.Ed. 1074; *Taylor v. Kentucky,* 98 S.Ct. 1930, 1933, Note 10, 436 U.S. 478, 56 L.Ed.2d 468.

There is no independent state ground to justify the holding that a national bank, acting as fiduciary of a trust, may hold a public auction of unregistered stock in which the trust has a vital interest, pursuant to the requirements of federal law, and that the bank or its affiliate may purchase such stock at its own sale, in competition with the interest of the trust. *Williams v. Kaiser,* 65 S.Ct. 363, 323 U.S. 471, 89 L.Ed. 398.

Furthermore, if such self-dealing, which is universally condemned by all courts from ancient times, and which has previously been condemned by the Supreme Court of Alabama as constituting an evil of the foulest nature[4], were now held to be permissible by the Supreme Court of Alabama under state law, the transaction in question runs afoul of and is repugnant to the Federal Securities Laws, and the self-dealing and conflict of interest provisions of the Regulations of the Comtroller of the Currency.

Other cases involving national banks have been reviewed by this court as involving a federal question. *Seabury v. Green,* S.C. 1935, 55 S.Ct. 373, 294 U.S. 165, 79 L.Ed. 834, 96 A.L.R. 1463; *Yates v. Jones Nat. Bank,* Neb. 1907, 27 S.Ct. 638, 206 U.S. 158, 51 L.Ed. 1002; *Grand Forks First Nat. Bank v. Anderson,* N.D. 1899, 19 S.Ct. 284, 172 U.S. 573, 43 L.Ed. 558; *Union Nat. Bank v. Louisville, etc. R. Co.,* Ill. 1806, 16 S.Ct. 1039, 163 U.S. 325, 41 L.Ed. 177; *McCormick v. Market Nat. Bank,* Ill. 1897, 17 S.Ct. 433, 165 U.S. 538, 41 L.Ed. 817; *Logan County Nat. Bank v. Townsend,* Ky. 1891, 11 S.Ct. 496, 139 U.S. 67, 35 L.Ed. 107; *Swope v. Leffingwell,* Mo. 1882, 105 U.S. 3, 15 Otto. 3, 26 L.Ed. 939.

CONCLUSION

The federal questions here involved are substantial and are of nation-wide importance. In *United States v. Philadelphia National Bank,* 374 U.S. 321, 10 L.Ed.2d 915, 83 S.Ct. 1715, this court found:

> "Thus, during the decade ending 1960 the number of commercial banks in the United States declined by 714, despite

---

[4]First National Bank v Basham 191 So 873,238 Ala. 300

> the chartering of 187 new banks and a very substantial increase in the nation's credit needs during the period. Of the 1601 independent banks which thus disappeared, 1503 with combined total resources of well over $25,000,000,000, disappeared as a result of mergers."

This court further pointed out in this case that the proper discharge of the functions of national banks is indispensable to the national economy, and that federal regulations are widespread not only upon federal banks but upon state banks as well, who are members of the Federal Reserve System and who are insured by the Federal Deposit Insurance Corporation.

Additionally, while respondent Southern Bancorporation was not a bank holding company during the period here involved, under the control of the Federal Reserve Bank[5], bank holding companies have mushroomed in this country, and great uncertainty exists in many quarters as to the procedure to be followed under the merger provisions of Title 12 USCA §215a, which needs to be resolved by this court.

Accordingly, it is in the national interest that the federal laws and regulations which govern the activities of national banks in such vital areas as mergers and fiduciary responsibility, and which delineate the relationship of national banks to those who regulate them, be decided by this court so that they might be clearly understood by the national banking industry, as well as by those who invest billions of dollars in their stocks, and who entrust like astronomical sums to their commercial and trust departments.

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[5]It was not until December 1970 that one-bank holding companies came under the control of the Federal Reserve Board, pursuant to Title 12 USCA §§1841, 1842.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS K. SIROTE, *attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust*
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PROOF OF SERVICE

I, Morris K. Sirote, attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of September, 1979, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of Alabama, together with appendices thereto, by mailing and depositing same in a United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. Lee C. Bradley Jr. and Macbeth Wagnon, Jr., 1500 Brown-Marx Building, Birmingham, Alabama 35203, attorneys for respondents Birmingham Trust National Bank and Southern Bancorporation of Alabama; to Hon. Donald B. Sweeney, Jr., 601-09 Frank Nelson Building, Birmingham, Alabama 35203, and James W. May, 2154 Highland Avenue, Birmingham, Alabama 35205, attorneys for John C. Henley, III, and to Hon. Jim O'Kelley, 1927 1st Avenue North, Birmingham, Alabama, special counsel for the Attorney General of the State of Alabama.

It is further certified that all parties required to be served have been served.

This the ..... day of September, 1979.

MORRIS K. SIROTE, *Attorney for Jack H. Harrison, as Temporary Trustee of the Linn-Henley Charitable Trust, Petitioner*
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